Supreme Court, U.S.
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No. 03-245

IN THE
Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX. REL. STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF AMICI CURIAE
Various Members of the Ohio General Assembly Minority Caucuses in Support of Petitioners

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INTEREST OF *AMICI CURIAE*

The appearance as *amici curiae* is made by forty duly elected and acting members of the current Ohio General Assembly.[1] The *amici curiae* include State Representatives Dixie J. Allen, Catherine L. Barrett, Joyce Beatty, John Boccieri, Thomas T. Book, Edna Brown, Kenneth A. Carano, Kathleen Chandler, Mary M. Cirelli, Michael DeBose, L. George Distel, John Domenick, Steven L. Driehaus, William J. Hartnett, Sandra Stabile Harwood, Annie L. Key, Dale Miller, Jeanine Perry, Larry Price, Chris Redfern, Daniel J. Sferra, Michael Skindell, Dan Stewart, Fred Strahorn, Barbara Ann Sykes, Peter Ujvagi, Charlie Wilson, Jr., Claudette Woodard, Tyrone K. Yates, and State Senators DanielR. Brady, Marc Dann, Greg L. DiDonato, Teresa Fedor, Eric D. Fingerhut, Robert F. Hagan, Leigh E. Herington, Mark L. Mallory, Ray Miller, C.J. Prentiss and Thomas M.Roberts .

These legislators represent over four million Ohioans and their districts include rural, suburban, and large urban city school systems. These legislators have been actively involved in seeking a constitutional method of funding Ohio's public schools and many have filed *amici curiae* briefs with the Ohio Supreme Courtin prior school funding litigation.

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[1] Counsel for the *amici*, in consultation with *amici* and their staff, authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

The *amici curiae* enter this appearance for the purpose of providing the Court with certain Ohio-specific information which may not be readily available to the parties or other *amici* and to provide a unique legislative perspective on this matter of national importance.

SUMMARY OF ARGUMENT

In its *DeRolph* decisions, the Ohio Supreme Court clearly and repeatedly declared Ohio's system of funding public education unconstitutional. However, this same court subsequently granted the State's request for a writ of prohibition against the trial court from conducting a compliance conference regarding the enforcement of the Ohio Supreme Court's remedial decrees. *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97 (2003) (*"Lewis"*).[2]

The Ohio Supreme Court's ruling in *Lewis* effectively denies any form of relief to the Petitioners. The court's decision in *Lewis* has a pervasive, resounding effect not only on the quality of education in Ohio, but also on the fundamental democratic ability of citizens to challenge state action.

Ongoing judicial supervision is both necessary and appropriate, especially in light of the precedents set by school desegregation cases. *See Freeman v. Pitts*, 503 U.S. 457 (1992) and *Swann v. Charlotte-Mechklenburg Bd. of Educ.*, 402 U.S. 1 (1971). These cases establish that a limited need for judicial supervision exists when the rule-

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[2] "[B]ecause it is beyond doubt that Judge Lewis and the common pleas court patently and unambiguously lack jurisdiction over any post-*DeRolph IV* proceedings, we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*." *Lewis* at 104.

making body fails to exercise good faith. Furthermore, judicial supervision does not raise concerns about usurping policy-making decisions from the sovereign people of Ohio. Rather, judicial action would restore the dignity of the Ohio Supreme Court's remedial decrees as having legal effect.

The Governor's Blue Ribbon Task Force on Financing Student Success should not serve as evidence of state action dismissing the need for judicial supervision. Seven previous commissions and committees were established with the same purpose of overhauling the state school-funding scheme. Many of these groups failed to generate any proposed changes; those that did were ultimately ignored by the legislature. In fact, the State proceeded to alter future public educational funding, acting in a manner counterproductive to the mandated goal of increasing the overall quality of public schools. *See* Sub. H.B. 95, 125th Gen. Assem., Reg. Sess. (Oh. 2003). Furthermore, the Governor affirmatively stated his belief that Ohio already has in place a constitutional system of funding schools. *See "Statement by [Ohio] Governor Bob Taft,"* Dec. 11, 2002, *available at* http://www.state.oh.us/gov/releases/Archive2002/121102derolph.htm (last visited Sept. 12, 2003).

The prohibition against enforcement of the remedial decrees allows a fundamentally unconstitutional educational system to continue to operate. This Court must allow judicial intervention by the trial court to restore ordered liberty and uphold respect for the rule of law.

ARGUMENT

I. The Petition Should Be Granted to Preserve Respect for the Rule of Law.

In four separate decisions, the Ohio Supreme Court determined that Ohio's system of funding public schools was unconstitutional. *DeRolph v. State* 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) *("DeRolph I")*; *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) *("DeRolph II")*; *DeRolph v. State,* 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) *("DeRolph III")*; *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) *("DeRolph IV")*.

After the first three decisions, the legislative and executive branches made limited attempts to address the Ohio Supreme Court's concerns, each time failing to meet the Ohio Constitutional requirement of securing a "thorough and efficient system of common schools throughout the state ...." Ohio Const., art. VI, § 2.

In the absence of any legislative activity by the State to comply with *DeRolph IV*, the Petitioners filed a motion with the trial court for a compliance conference. The State responded by filing an original action in the Ohio Supreme Court requesting a writ of prohibition to bar the trial court from entertaining Petitioners' motion and the Ohio Supreme Court subsequently entered a judgment granting the State's request. *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97 (2003)("*Lewis*").

After *DeRolph IV* and the *Lewis* decision, the State actually backtracked from a system already found to be unconstitutional. If access to the courts is denied to

enforce four Ohio Supreme Court remedial decrees, many other states in similar situations will experience Ohio's dilemma --- a favorable decision with no enforceable remedy. There would remain little to no incentive for any plaintiff in any state to challenge state action on constitutional grounds.

A brief overview of past legislative and executive responses (or lack of response) to the Ohio Supreme Court school funding decisions may help illustrate the need for judicial intervention in matters of this significance, particularly when respect for the rule of law is at stake.

Over the last nine years, at least seven commissions and committees have been established to address aspects of Ohio's school funding system.[3] And while certainly several positive steps have been made by the State over the last decade, the following recitation of some of the shortcomings are worth noting given the stark reality of the *Lewis* decision.

In response to the initial trial court decision in *DeRolph*, the State Board of Education and Ohio School Superintendent appointed a commission to respond to the decision. The legislature never implemented the commission's proposal.

In response to the first decision of the Ohio Supreme Court (*DeRolph I*), the "Ohio School Funding Task Force" was appointed. A sixteen member legislative

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[3] For a brief overview of past commissions, see "*A History of Commissions*", an insert included in the article by Catherine Candisky, "*School-funding panel optimistic,*" Cols. Dispatch, Aug. 4, 2003, at C1.

committee was also formed to develop a remedy but the panel never issued a report.

While the legislature did approve several pieces of legislation in response to *DeRolph I*[4], including provisions that increased funding for the school foundation formula and school facility construction, the trial court again ruled the system unconstitutional. Thereafter, the Ohio Supreme Court issued its second *DeRolph* decision, indicating that "[t]he General Assembly must give this problem its undivided attention. If it is not addressed and solved immediately, it will only increase in magnitude." *DeRolph II* at 3. The Court also stated that certain unfunded mandates "must be addressed and immediately funded." *Id.* at 37.

DeRolph II was issued on May 11, 2000. The State did not timely address the Court's mandate. The first piece of legislation enacted to address unfunded mandates occurred after November 2000. Am. Sub. S.B. 345, 123rd Gen. Assem., Reg. Sess. (Oh. 2000).

Two joint legislative committees were convened after the *DeRolph II* decision was rendered. The "Joint Committee on School Funding and Accountability" was formed, held meetings, and never issued a report of any kind. The "Joint Committee to Re-Examine the Cost of an Adequate Education" met for the first time on August 22, 2000, and did not issue a report until December 31, 2000. Legislation representing the State's response to *DeRolph II* was signed by the Governor less than one

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[4] *See* Sub. H.B. 650, 122nd Gen. Assem., Reg. Sess. (Oh. 1998); Am. Sub. S.B. 102, 122nd Gen. Assem., Reg. Sess. (Oh. 1997).

month prior to the Ohio Supreme Court's June 15, 2001, deadline. The Ohio Supreme Court subsequently found this effort unconstitutional in *DeRolph III.*

In response to *DeRolph III*, the State moved for reconsideration, which was granted by the Court pending the outcome of mediation. After mediation failed, the Ohio Supreme Court issued *DeRolph IV*, vacating *DeRolph III* and determining that *DeRolph I* and *II* are the law of the case and again stating that the current school funding system is unconstitutional. The Ohio Supreme Court noted the following:

> To date, the principal legislative response to *DeRolph I* and *DeRolph II* has been to increase funding, which has benefited many schoolchildren. However, the General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. [citations omitted] Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

DeRolph IV at 3.

On the very same day *DeRolph IV* was handed down, the Ohio Governor held a press conference, stating:

> Today the Ohio Supreme Court *ended* the 11-year-old DeRolph school-funding lawsuit. The Court vacated its September 2000 [*sic*] ruling in DeRolph III and relinquished any ongoing oversight of the case. *The DeRolph case is over. ...I continue to believe* with the changes we made pursuant to DeRolph I and II, *Ohio has a constitutional system of funding our schools.*

"Statement by [Ohio] Governor Bob Taft," Dec. 11, 2002, *available at* http://www.state.oh.us/gov/releases/Archive2002/121102derolph.htm (last visited Sept. 12, 2003)(emphasis added).

Several months later, the Governor issued an executive order that cut $99.9 million from the Department of Education, of which $90.6 million was to go directly to school districts for foundation aid and parity aid for fiscal year 2003. Exec. Order 2003-03T [Ohio], Mar. 5, 2003.

In addition, the first state operating budget, which includes funding for education, signed into law after *DeRolph IV* actually backtracked from the system found unconstitutional. The State reduced planned increases in the state foundation formula from 2.8% to 2.2%, delayed full implementation of special education funding weights, and failed to implement a new method of counting poor students that reduced aid to poor school districts by over $75 million per year. Sub. H.B. 95, 125th Gen. Assem., Reg. Sess. (Oh. 2003).

Although first mentioned in the Governor's State of the State address on January 22, 2003, the inaugural meeting of the Governor's Blue Ribbon Task Force on Financing Student Success was held on August 7, 2003. Given Ohio's history, it would be particularly disingenuous for the State to use such a commission as evidence that judicial intervention regarding compliance with *DeRolph* remedial decrees is not warranted.

Furthermore, the Petitioners are not asking that the United States Supreme Court decide a state policy question rather than the people of Ohio. Rather, the issue remains access to the courts for enforcement of the Ohio Supreme Court's remedial decrees.

This Court has rejected the notion that a state or local government may refuse to comply with judicially ordered remedies. The *Lewis* decision calls into question respect for the rule of law both in Ohio and in other states facing similar circumstances. At a time when the judiciary is seemingly under constant attack, the ability for a state government with a history of noncompliance with previous orders to simply ignore remedial decrees and instead wait for an entirely new case to be filed and wind its way through the system, perhaps for another decade as was the case with *DeRolph* and its progeny, offends historical notions of ordered liberty.

The current situation is analogous in many respects to desegration cases, in which the judiciary has recognized a limited need for continued supervision. When school districts did not demonstrate good faith under a comprehensive plan to remedy ongoing violations, "we have without hesitation approved comprehensive and

continued district court supervision." *Freeman v. Pitts*, 503 U.S. 457, 499 (1992); *See also Swann v. Charlotte-Mechklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The State has had four distinct opportunities to comply with the Ohio Supreme Court's remedial decrees and has failed to do so.[5] Furthermore, judicial authority to enforce remedial decrees takes on heightened importance when there are ongoing violations of declared rights. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978).

Petitioners succinctly stated in their *Petition for Writ of Certiorari* the reality of the *Lewis* decision, in that Lewis stands "ordered liberty" on its head, enabling Ohio's legislative and executive branches to continue to knowingly violate the law while affirmatively prohibiting Ohio's courts from enforcing compliance with the law.

Such a situation only encourages active disregard for the rule of law. It will indeed be a blow to judicial integrity if the *Lewis* decision is allowed to stand.

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully urge the Court to grant the *Petition for Writ of Certiorari.*

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[5] One glaring example of the State's intransigence is the lack of a serious effort to address an over-reliance on property taxes within the school funding system, an issue the Ohio Supreme Court raised beginning with *DeRolph I.*

Respectfully submitted,

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